

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Tracy, California)

EVERGREEN HEALTH CARE d/b/a
EVERGREEN NEW HOPE HEALTHCARE CENTER¹
Employer

and

Case 32-RC-4997

HEALTH CARE WORKERS UNION LOCAL 250,
SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU), AFL-CIO²
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly being filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Petitioner appears as corrected at the hearing.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner is currently recognized by the Employer in the following bargaining unit, herein called the Recognized Unit:

All full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by the Employer at its facility located at 2586 Buthmann Avenue, Tracy, California; excluding professional employees, technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined by the Act.

On September 10, 2001, a self-determination election was conducted among the following employees of the Employer to determine if these employees desired to become part of the Recognized Unit:

All full-time and regular part-time registered nurses employed by the Employer at its Tracy, California facility; excluding the director of nursing, director of staff development, medical data set coordinator, assistant medical data set coordinator, all other professional employees, guards, and supervisors as defined in the Act.

A majority of the registered nurses who voted indicated a desire to be included in the Recognized Unit and on December 11, 2001, the results of this election were certified. On May 8, 2002, the Board upheld this certification and ordered the Employer to bargain with Petitioner as the representative of a unit comprised of

the employees who had been included in the Recognized Unit and the registered nurses, herein called the Certified Unit.³

6. Petitioner seeks by means of a self determination election to add to the existing unit a residual unit consisting of the Receptionist, the Medical Records Assistant and the Social Services Director. Contrary to the Petitioner, the Employer contends that these three positions should be excluded from the unit because they are all confidential employees; because the Receptionist and the Medical Records Assistant are business office employees; and because the Social Service Director is a supervisor, a professional employee and/or a managerial employee, within the meaning of the Act. For the reasons discussed below, I will order a self-determination election to determine if the employees at issue in this case desire to be represented by the Union and included in the existing unit.

Background

The Employer operates a 99 bed skilled nursing facility located in Tracy, California, which is licensed by the State of California and which participates in both Medicare and Medicaid programs. Ruby Rakow is the Executive Director of the facility and its chief administrator.

³ On May 31, 2002, the Employer filed a Petition for Review with the Ninth Circuit Court of Appeals of the Board's Decision and Order in *Evergreen New Hope Health and Rehabilitation Center*, 337 NLRB No. 71 (2002), and has refused to bargain with the Petitioner regarding the registered nurses in the Certified Unit. Even if the Court refuses to enforce the Board order as to the Employer's obligation to bargain with Petitioner regarding the registered nurse, I would still find that the three classifications in issue herein should be included in the Recognized Unit.

Receptionist

The Employer contends that receptionist Nancy Hill is ineligible to be included in the existing unit because she is a confidential employee and a business office clerical. In this regard, the Employer contends that Hill is a confidential employee, because she may be able to overhear confidential discussions held in Rakow's office, as well as Rakow's side of telephone conversations regarding confidential matters. In addition, the Employer notes that because Rakow left her office door open, Hill had access to Rakow's office. The Employer also relies on the fact that Hill retrieves faxes for Rakow, which may relate to confidential or labor relations matters. Furthermore, the Employer contends that Hill is a confidential employee because she sometimes copies and mails Rakow's written responses to grievances filed by the Union and because Hill was made privy to confidential labor relations information when she attended Employer meetings in January 2002, at which she was given a copy of the Employer's strike manual and was told how the facility was going to operate if the unit employees went out on strike.⁴ Finally, the Employer argues that Hill has a greater community of interest with other business office clericals than with the employees in the Certified Unit, so it would not be appropriate to include her in a unit with the employees in the Certified Unit, which excludes business office employees.

Receptionist Nancy Hill works at a desk in the main lobby of the facility, just outside the business office area of the Employer's facility. Her desk is about

⁴ According to Rakow, in January 2002, the facility received a 10 day strike notice from the Union. The Employer then held meetings with supervisors, managers and employees who were not in the Certified Unit.

12 feet from the door to Executive Director Rakow's office, which is one of the offices in the business office area. According to the job description for her position (Switchboard Operator-Receptionist) Hill's duties include: (1) operating the switchboard and paging system, which involves receiving and transferring incoming calls and transmitting information to callers; (2) greeting, screening and directing visitors, guests and sales representatives; and (3) assisting with business office duties such as miscellaneous typing, stuffing envelopes and preparing lists as directed by the Office Manager or the Executive Director. While Hill's immediate supervisor is the Office Manager,⁵ who assigns and directs her work, Hill sometimes performs miscellaneous office work for Executive Director Rakow. According to Rakow, these tasks include making copies, addressing and mailing envelopes, filing of some documents, retrieving and distributing faxes, and occasionally typing letters. In addition, one of Hill's duties is to copy and mail to the Union, the Executive Director's written responses to Union grievances. According to Rakow's testimony, over the two years that Hill has been the receptionist, she has copied and mailed to the Union about 15 to 20 grievance responses for Rakow. However, the bulk of Hill's day is spent answering phones and greeting visitors. In this regard, Rakow testified that Hill spends six of the eight hours she works at the facility each day answering phones and greeting visitors who enter the facility.

It is well established that the party asserting confidential status has the burden of providing evidence to prove its assertion. *S.S. Joachim & Anne Residence*; 314 NLRB 1191, 1195-96 (1994); *Intermountain Electric Assn.*, 277

⁵ Hill also attends employee meetings with the business office staff.

NLRB 1 (1985). In *S.S. Joachim & Anne Residence*, the Board set forth the test for determining whether an employee is a confidential employee:

The Board applies a narrow test in making determinations as to whether an employee is “confidential” and will exclude an employee from a bargaining unit as confidential only if that employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. (cites omitted) The Board will also exclude employees who have access to confidential information regarding anticipated changes that may result from collective bargaining negotiations.... (cite omitted) Id.

Based on the above and the record as a whole, I find that the Employer has not met its burden regarding Hill. Thus, the record evidence does not establish that Hill acts in a confidential capacity to Executive Director Rakow, who is in charge of labor relations at the facility. Furthermore, the record establishes that Hill does not have access to information regarding anticipated changes that may result from collective bargaining. In this regard, while Hill might be able to overhear discussions in Rakow’s office, or may have the opportunity to read a confidential fax that she retrieves for Rakow from the business office fax machine, the Board has long rejected the notion that such possible exposure to confidential information is sufficient to make an employee a confidential employee. *Swift & Co.*, 119 NLRB 1556, 1557 (1958). Similarly, the Board has long rejected the contention now raised by the Employer that an employee, like Hill, who merely types an employer’s response to union grievances is a confidential employee. The Board explained that even though the individual might learn of the information before the union, the information is in the process of being transmitted to the union. *Bakersfield Californian*, 316 NLRB

1211, 1212 (1995); *PTI Communications*, 308 NLRB 918 (1992); *John Sexton & Co.*, 224 NLRB 1341 (1976); *RCA Communications, Inc.*, 154 NLRB 34 (1965).

Further, neither the fact that Hill attended the staff meetings in January 2002, about how the facility would operate during the threatened strike, nor the fact that she was given a copy of the Employer's corporate manual regarding operations during a strike, make her a confidential employee. In this regard, according to Rakow's testimony, all employees who were not in the Certified Unit were told to attend the meetings and were given a copy of the strike manual regarding. Even assuming that this interaction constituted access to confidential labor relations information, such an isolated event is not the type of regular access to confidential labor relations material the Board requires to find an employee to be a confidential employee. *Crest Mark Packing Co.*, 283 NLRB 999 (1987).

Finally, I reject the Employer's contention that Hill should not be included in the unit because she is a business office clerical and thus part of a classification that has been historically excluded from the unit. Hill's duties are clerical in nature, but are not the type of duties performed by a business office clerical. Thus, there is no evidence that she regularly works on financial or billing documents or communicates with Medicare or Medicaid regarding such matters. I also note that although her supervisor also supervises the business office clericals, Hill's desk is located in the main lobby and not in the business office area. In a case involving similar facts, the Board concluded that a receptionist was not a business office clerical and therefore should be included in a broad

service and maintenance unit. *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995). I therefore conclude that Hill is not a business office clerical and that she should be included in the petitioned-for unit.

Medical Records Assistant

The Employer contends that Medical Records Assistant Sharon Dutra is ineligible to be included in the existing unit because she is a business office clerical and a confidential employee. As with Hill, the Employer asserts that as business office clericals are specifically excluded from the Recognized Unit, the Petitioner cannot now attempt to include her in the unit. Regarding the claim that Dutra is a confidential employee, the Employer asserts that Dutra has access to confidential information based on two factors. First, the Employer relies on the fact that Dutra has access to the fax machine located in the business office, and second, the Employer relies on the fact that Dutra attended the meetings in January 2002, regarding how the facility would operate if the unit employees went out on strike and received a copy of the Employer's strike manual.

Sharon Dutra is the Medical Records Assistant and works part-time, Monday through Friday, 8 a.m. to noon. Dutra shares an office with the Medical Records Director who is her immediate supervisor.⁶ Dutra's job consists primarily of entering data into the computer regarding doctor's orders, and minimum data entry sets.⁷

⁶ The Medical Records office is not one of the offices located in the business office area; rather, it is located off the front lobby.

⁷ Minimum data entry sets are resident assessment tools that the facility is required by law to complete for each patient.

Dutra does not perform business office clerical work, and for the same reasons that I did not find Hill to be a business office clerical, I find that Dutra is not a business office clerical. *Lincoln Park Nursing Home*, supra.

I also find that Dutra is not a confidential employee. In this regard, the record is devoid of any evidence that Dutra either acts in a confidential capacity to any person exercising managerial functions in labor relations or that she has regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations. *Crest Mark Packing Co.*, supra. Thus, I will include Dutra in the petitioned-for unit.

Social Service Director

The Employer contends that Social Service Director Wynona Thomas is ineligible to be included in the existing unit because she is both a supervisor and a manager and because she is a professional employee and a confidential employee. The Employer contends that Thomas is a supervisor because she has hired three employees, assigned and directed their work when these employees worked for her; and because she has the authority to discipline employees. The Employer further contends that Thomas is a manager because she is a member of the management team at the facility, attends monthly meetings of department heads, creates social service policies for the facility, is responsible for administrative, educational and regulatory compliance of the Social Service Department and is involved in providing training to employees regarding social service issues. In its brief, the Employer does not explain in any

detail the basis of its argument that Thomas is a professional employee and a confidential employee.

Thomas has been the Social Service Director for about four or five years.⁸ For about a six month period ending about two years prior to the start of the hearing, she held the position of Medical Records Director as well as the Social Service Director position. During that six month period, Thomas hired three employees: two Social Service Assistants and a Medical Records Assistant. The first Social Services Assistant she hired was promoted after a few months, and Thomas then hired a replacement who lasted only a few months and was not replaced. In each case, Thomas interviewed the applicant for the position and made the decision whom to hire entirely on her own. About two years ago, Thomas gave up the Medical Records Director position. She continued to hold the Social Service Director position and assumed the work previously performed by her assistant.⁹ During the period when a Social Service Assistant was employed at the facility, that individual reported to Thomas, who assigned and directed the Social Service Assistant's work. Since that time, the facility budget has not authorized the hiring of a social service assistant and there is no evidence that the hiring of a Social Service Assistant is anticipated in the future. Also, since the last Social Services Assistant ceased working for the Employer, Thomas has not had any employee working for her.

⁸ Thomas did not testify at the hearing; rather, Executive Director Rakow was the only witness to testify at the hearing.

⁹ When Thomas gave up the Medical Records Director position, a new Medical Records Director was hired, and that person supervises the medical records assistant.

As Social Service Director, Thomas reports directly to Executive Director Rakow and, according to the Social Service Director job description, Thomas is accountable to Rakow for the “administrative, educational, and regulatory compliance for the Social Services Department and its staff.” While the job description states that the Social Service Director is required to have a bachelor’s degree in a human services related field, preferably social work, Thomas has no degree. Rather she has a certificate, which she received for completing an eight to ten week class in social services.

Thomas is also responsible for ensuring that the Social Service Department is in compliance with all state and federal regulations and standards. In addition, Thomas has worked with Rakow in creating social services policies for the facility based on state and federal guidelines and requirements. In this capacity, Thomas is also responsible for providing continuing education programs for facility staff in areas related to social services. The facility is required by the State of California to hold certain in-service programs each year on social service related topics, such as patients’ rights, and Thomas is responsible for providing these programs. In addition, she may provide “in-service” programs for staff on an impromptu basis if an important social service issue arises.¹⁰ Finally, as Social Service Director, Thomas attends the monthly meetings for department heads, where issues such as staffing and new regulations or policies received from corporate headquarters are discussed.¹¹

¹⁰ For example, Thomas recently held an impromptu in-service training class on theft and loss, after patients reported some of their personal property was missing.

¹¹ According to Executive Director Rakow, there are 11 department heads who attend these meetings: Activities Director, Director of Medical Records, Director of Payroll and Human

The evidence does not establish that these meetings concern such labor relations issues as collective bargaining or grievance resolution.

The record reveals that the primary duty of the Social Service Director is to handle patient and patient family complaints. Executive Director Rakow testified that Thomas is supposed to handle, at least initially, all complaints filed by patients and their families; although Rakow also testified that patient complaints are sometimes brought directly to Rakow or the Director of Nursing. In carrying out her responsibilities regarding the complaints, Thomas holds family counseling meetings to try to resolve the complaints. If the complaints cannot be resolved through counseling, or if they involve possible misconduct by employees, Thomas must bring the complaints to the attention of the Executive Director or the Director of Nursing. According to Rakow, after an investigation, Thomas may recommend that some action be taken against an employee involved in a patient or family complaint. However, there is no evidence in the record of Thomas ever disciplining an employee or effectively recommending the disciplining an employee based on patient or family complaints about an employee's conduct. Instead, the record reveals that on some occasions she has told Rakow that "something" should be done." Thomas and/or Rakow deal with the ombudsman¹² and the State of California directly on complaints of abuse of patients by family or staff. Moreover, with regard to the complaints of abuse,

Resources/Business Office Manager, Dietary Supervisor, Medical Data Sets Coordinator, Director of Physical Environment, Director of Nursing, Director of Staff Development, Social Service Director and the Executive Director.

¹² The ombudsman is a volunteer patient's advocate whose name and telephone number are posted throughout the facility.

Thomas may be required to notify Adult Protective Services or the District Attorney's office.

In addition to her patient complaint handling duties, Thomas also is responsible for filling out the social service section of each patient's medical data set, and the record shows that she does so based on entries made on the patient's medical chart.

The Supervisory Issue

The party asserting that an individual is a supervisor under the Act bears the burden of proving the person's supervisory status. *Kentucky River Community Care*, 121 S.Ct. 1861 (2001); *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998). The possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires a significant degree of independent judgment in a manner that is more than routine or clerical. *Kentucky River Community Care*, *supra*; *Harborside Healthcare, Inc.*, 330 NLRB No. 191 (2000); *Youville Health Care Center, Inc.*, *supra*. The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner, however, does not confer supervisory status on employees. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985); *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Because supervisory status removes individuals from the protection of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S. Rep. No. 105. 80th Cong. 1 See. 4

(1947); *Ten Broeck Commons*, supra. at 809. In the instant matter, the Employer has failed to meet its burden to establish the supervisory status of Thomas.

The record demonstrates that during a period of time ending about two years ago, Thomas did possess and exercise supervisory authority. Thus, over a several month period ending about two years ago, Thomas hired and directed the work of three employees. However, the record also demonstrates that about two years ago Thomas gave up the Medical Records Director position, while keeping the Social Service Director position. More importantly, for the last two years Thomas has not supervised anyone or exercised any of the indicia of supervisory status, and the Social Service Department during this period has been made up only of Thomas. While it is well established that an individual with statutory supervisory authority does not lose that status simply because it is infrequently exercised, it is also well established that to be a statutory supervisor an individual must exercise supervisory authority over at least one employee. *Miller Electric*, 301 NLRB 294, 297 (1991).

The Employer contends that Thomas still retains her supervisory authority in that she would hire and supervise any Social Service Assistant who may be hired by the Employer in the future. This authority is merely speculative in view of Executive Director Rakow's testimony that there are currently no plans, and no provision in the facility's budget, to hire a Social Service Assistant. Further, while the Employer contends that Thomas has the authority to discipline employees outside the Social Service Department based on her investigation of patient complaints, the record does not support this contention. Thus, as indicated

above, Thomas's role in the disciplining employees due to patient complaints has been limited to telling Rakow that she thought something needed to be done. There is no evidence that any employee has actually been disciplined as a result of her non-specific recommendations. Accordingly, based on the above and the record as a whole, I find that the Employer has failed to meet its burden to establish that Thomas is a supervisor.

The Managerial Issue

The Board has long held that managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employers established policies. *S.S Joachim & Anne Residence*, supra, at fn. 6; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In *NLRB v. Yeshiva University*, 444 US 672 (1980), the Court added that managerial employees must also be aligned with management. The Board has also long held that the party asserting that an individual is a manager under the Act bears the burden of proving the person's managerial status. *S.S. Joachim & Anne Residence*, supra. In the instant matter, the Employer has failed to meets its burden to establish that Thomas is a manager under the Act.

In this regard, the evidence in the record is insufficient to enable me to determine the extent of Thomas's authority to formulate and effectuate management policies, and it is insufficient to enable me to determine whether Thomas exercises sufficient discretion in the performance of her duties,

independent of the Employer's established policies. Thus, the only testimony about Thomas's duties and responsibilities is the testimony of Executive Director Rakow, and her testimony is largely conclusionary and not sufficiently detailed to establish that Thomas actually formulates, determines or effectuates new policies; significantly revises policies; or exercises discretion in the performance of her job independent of the Employer's established policies. Mere conclusionary statements of an individual's authority are insufficient to establish supervisory or managerial status. See Quadres Environmental Co., 308 NLRB 101, 102 (1992) (citing Sears Roebuck & Co., 304 NLRB 193 (1991)).

For example, Rakow testified that Thomas develops policies to ensure that the facility is in compliance with state and federal regulations and standards. However, Rakow did not testify to, and the record is devoid of, any specific policy actually created or significantly revised by Thomas. It is also impossible to tell how many such policy changes have occurred during Thomas's tenure as the Social Service Director, or how significant these changes were. Similarly, while Rakow testified, in response to a leading question from the Employer's counsel, that Thomas exercised independent judgment in creating these policies, Rakow gave no details about how Thomas develops the policies or about the degree of discretion or judgment exercised by Thomas. This is a serious omission in light of Rakow's testimony that in addition to providing new regulations and standards, the state and federal agencies also provide guidelines regarding the implementation of the new regulations and standards. In addition, the Employer's corporate office provides guidelines/input regarding new regulations

and standards. Furthermore, Rakow testified that she usually works with Thomas on making new policies, but Rakow did not define the role each played in this process. As the Employer has not demonstrated what role Thomas played in the preparation or implementing of these new or revised policies, I cannot determine whether Thomas actually formulated new policies through the exercise of discretion, independent of the Employer's established policies, or whether she was merely involved in carrying out the more routine clerical task of essentially incorporating and slightly modifying materials prepared by others into the policies for this facility. Thus, in view of the extensiveness of state and federal guidelines for implementing new regulations and standards; the input from the Employer's corporate office and from Rakow; and the paucity of record evidence as to the specific role Thomas plays in developing the social service policies for the facility, I find that Thomas's role in developing social service policies for the Employer is insufficient to establish that she is a managerial employee.

Similarly, the evidence regarding Thomas's role in holding "in-service" training sessions on social service topics for other employees is not sufficient to establish that Thomas is a manager. Thus, it appears from the record that the content and the frequency of many, if not most, of the training sessions are mandated by the State of California, and the sessions are scheduled by the Director of Staff Development. The evidence does not establish how complex the subject matter was at the training sessions conducted by Thomas, nor does it establish how much of the material transmitted by Thomas in the training sessions was merely a recitation or paraphrasing of materials prepared by other,

such as the state or federal government or the Employer's corporate office. Further, while Thomas's preparation and presentation of the training sessions, such as her repeated sessions regarding loss prevention for the patients' belongings, undoubtedly involved the exercise of some independent judgment and discretion, the evidence does not establish that her exercise of discretion in this regard was independent of the Employer's established policies, a necessary element in establishing that an individual is a managerial employee. I also note that there is no evidence that Thomas was involved in any testing or evaluating of employees during or based on these training sessions, or that she has given any training sessions on non-social service topics such as labor relations.

Executive Director Rakow also testified that Thomas has the authority to hold "impromptu" in-service training sessions on her own initiative. The Employer did not provide testimony regarding how Thomas proceeds when she wishes to hold an impromptu training session, or whether there are guidelines that Thomas is to follow regarding setting up impromptu training sessions. Although Rakow also testified that it is mandatory for employees to attend training sessions, she also admitted that no employee has ever been disciplined for failing to attend a mandatory training session and that the Employer essentially leaves it up to the employees if they want to attend such sessions.

Also, the evidence regarding Thomas's role in handling patient and family complaints does not establish that she is a manager. Thomas is the person to whom patients and their families are to report complaints. According to Rakow, Thomas attempts to resolve the complaints; although, the evidence does not

establish what authority Thomas has in attempting to resolve such complaints. Certainly she is required to report complaints involving alleged patient abuse to Rakow. From the record, it appears that Rakow and the Director of Nursing make all decisions on whether an employee is to be disciplined as a result of a patient complaints, and Thomas's role appears to have been limited to, at most, making non-specific recommendations that she thought something should be done.

Lastly, the fact that Thomas attends management meetings is not sufficient to establish that she is a manager under the Act. While Rakow testified that all department heads attend these meetings wherein issues such as staffing, facility policies and procedures, and new state and federal regulations are discussed, there is no evidence that these meetings are anything other than an opportunity for Rakow to provide information to the managers regarding the regulations and policy changes. Thus, the evidence does not establish that Thomas is involved in the formulation or implementation of labor relations policies at these meetings, or that she is privy to the Employer's collective-bargaining strategy grievance adjustment strategy due to her attendance at these meetings.

The Professional Employee Issue

The Employer also takes the position that Thomas is a professional employee. Section 2(12) of the Act defines "professional employee" as:

- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output

produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

However, the evidence adduced at the hearing fails to establish that Thomas is a professional employee under the Act. Thus, while Thomas's work requires at least some knowledge of social services and experience in the field, it does not require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning" as required under Section 2(12). In this regard, as discussed above, while the Employer's job description for Thomas's position requires a bachelor's degree, preferably in social work, Thomas has only a certificate in social services obtained after an eight to ten week course. Moreover, there is no evidence that she attained the "knowledge of an advanced type" required of a professional under the Act through any other means. The evidence also does not establish that Thomas's work, a majority of which is dealing with complaints about patient care, is primarily intellectual and varied in nature, or that it involves the consistent exercise of discretion and judgment. I have therefore concluded that she is not a professional employee. See *Community Health Services, Inc.*, 259 NLRB 362 (1981).

The Confidential Employee Issue

There appears to be three bases which arguably might support the Employer's assertion that Thomas is a confidential employee. The first two

bases are the same ones that were raised regarding Hill and Dutra; namely, the fact that Thomas attended the stand up meeting where the impending strike was discussed and the corporate strike manual was distributed. For the reasons noted above, these incidents do not constitute a basis for finding that Thomas is a confidential employee. The third bases would be that Thomas attends monthly meetings held for department heads.¹³ However, the evidence shows that these meetings concern staffing needs, new regulations, policies and procedures. There is no evidence that these meetings address collective bargaining issues or grievance adjustment strategy. Moreover, Rakow admitted that Thomas is not involved in labor relations matters. I therefore conclude that the evidence does not establish that Thomas assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations, or that she has regular access to confidential information regarding anticipated changes that may result from collective bargaining negotiations. Therefore I conclude that the Employer has not met his burden of establishing that Thomas is a confidential employee. *S.S. Joachim & Anne Residence, supra.*

In sum, I have determined that the evidence in the record is insufficient to establish that Thomas is a supervisor, manager, professional employee, or confidential employee under the Act. Thus, I will include Thomas in the petitioned for unit.

¹³ It is unclear whether Thomas attends all such management meetings.

Accordingly, I shall direct a self-determination election among the following employees:

All full-time and regular part-time receptionists, medical record assistants and social service directors employed by the Employer at its Tracy, California facility; but excluding all guards, professional employees, and supervisors as defined by the Act.

If a majority of ballots are cast for the Petitioner, they will be taken to have indicated the employees' desire to be included in the existing unit of all full-time and regular part-time registered nurses (RNs), licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed at the Tracy, California facility; excluding, the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant data set coordinator (AMDSC), all other professional employees (other than registered nurses), all technical employees, business office clerical employees, dietary/supervisor cooks, guards, and supervisors as defined in the Act. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented. In any event, an appropriate certification will issue.

There are approximately three employees in the voting group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's

Rules and Regulations.¹⁴ Eligible to vote are those in the voting group who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by Health Care Workers Union, Local 250, Service Employees International Union (SEIU), AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon*

¹⁴ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

Health Care Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before June 17, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 24, 2002.

Dated at Oakland California this 10th day of June, 2002.

Ralph A. Muller,
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

32-1246

Digest Numbers:

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177-2401-6750-0000

177-2401-6750-6700

177-2401-6800-0000

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